

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

TREE & LAND, INC.
Employer

And

LABORERS' DISTRICT COUNCIL OF
CHICAGO AND VICINITY,
Petitioner

And

Case 13-RC-21100

PRODUCTION WORKERS UNION OF
CHICAGO AND VICINITY, LOCAL 707
Intervenor

And

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 150 and INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, LOCAL 703
Joint Intervenors

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing commenced on December 8, 2003, and resumed on January 8, 2004 (pursuant to an Order remanding the matter for further evidence), before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board, to determine an appropriate unit for collective bargaining.¹

¹ Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

I. ISSUES

The Petitioner, Laborers' District Council of Chicago and Vicinity, amended its petition at hearing to seek an election within a unit comprised of full-time and regular part-time employees employed by the Employer, Tree & Land, Inc., at its Sheridan, Illinois facility, who occupy the job classifications of construction laborers, plantsmen, truck drivers, and general laborers.² The Employer and Intervenor Production Workers Union of Chicago and Vicinity, Local 707 (hereafter referred to as the "Production Workers"), contend that an existing collective-bargaining agreement bars an election within the petitioned unit. All parties stipulated at hearing that a contract exists between the Employer and the Production Workers and that the petitioned unit is an appropriate one for purposes of collective bargaining. The Petitioner contends, however, that the Production Workers did not represent a majority of unit members at the time the contract was signed, and therefore the contract is not a bar to the instant petition. In addition, the Petitioner contends that employee Michael Daidone who was employed as a salaried laborer/foreman in year 2003, should not be eligible to vote in any election which may be ordered, because he is the brother-in-law of the Employer's President and receives favorable treatment which prevents him from sharing a community of interest with the other unit members.

Finally, if an election is ordered, since the evidence discussed *infra* indicates that the Employer's business is seasonal, it is necessary to determine the appropriate time of the year in which to conduct the election.

II. DECISION

For the reasons discussed in detail below, it is concluded that the evidence is insufficient to establish that the Intervener Production Workers Union represented a majority of unit members at the time it executed a contract with the Employer; and consequently, it cannot be concluded that it is a contract within the meaning of Section 9(a) of the Act. Therefore, the contract does not bar the instant petition. It is also determined that due to the seasonal nature of the Employer's business, the election ordered herein shall be conducted during the Employer's peak landscaping season.

Lastly, it is concluded that if employee Michael Daidone is employed on the eligibility date and the date of the election as a laborer/foreman, he shall be permitted to vote subject to challenge.

The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

² The petition was filed on October 31, 2003, less than six months from the date Intervenor Production Workers Union of Chicago and Vicinity Local 707 claims to have executed a contract with the Employer covering some or all of the petitioned employees. Therefore, Section 10(b) of the Act does not preclude the undersigned from making a determination of the validity of this contract for contract-bar purposes, See Bryan Manufacturing, 362 U.S. 411 (1960).

All full-time and regular part-time construction laborers, plantsmen, truck drivers, and general laborers employed by the Employer at its Sheridan, Illinois facility; BUT EXCLUDING all working foremen, mechanics,³ office clerical employees, guards and supervisors as defined in the Act.

There are approximately 23 employees in this unit.

III. STATEMENT OF FACTS

The Employer is engaged in the landscape industry providing landscape maintenance and installation services. The Employer contracts with various clients to install new landscapes including grading the ground; seeding grass and/or laying sod; installing soil erosion barriers, and planting trees, shrubs, and other plants. The Employer also contracts to maintain existing landscapes, which includes mowing grass, trimming shrubs, fertilizing lawns, planting seasonal plants, weeding, watering, spraying, and related services.

Due to the nature of the Employer's business, employees are laid off at the end of each season and recalled (or rehired) at the commencement of the following season. The Employer's President testified that employees are typically recalled between March and June and are laid off between October and November, depending upon weather conditions the work season may be lengthened if there is a warm winter. According to the President, a core group of employees regularly return to work each year. Payroll records for the first and last payroll periods of each year, from 1999 through 2003, indicate that the average retention rate of employees from one season to the next is 73.5%.

In June 2003, the Employer employed approximately twenty-three employees in the four job classifications within the petitioned unit: seven were employed as truck drivers, and sixteen were employed as either plantsmen, construction laborers, or general laborers. The truck drivers deliver equipment, plants, and other necessary supplies to the jobsites and assist the workers at the jobsite in unloading the trucks. Apparently the plantsmen, construction laborers and general laborers' job duties are interchangeable depending upon the type of work available at the time. Their duties include performing planting, mowing, trimming, fertilizing, seeding, laying sod, weeding, and installing erosion barriers.

Although not at issue in this decision, the Employer also employs an unknown number of working foremen/operators and mechanics who are represented by Intervenor International Union of Operating Engineers Local 150 (hereafter referred to as "Operating Engineers"). The working foremen/operators work alongside the plantsmen, construction laborers, and general

³ At the resumption of the hearing the petition was amended to exclude working foremen and mechanics from the unit, and all parties concurred with this amendment. These classifications were excluded because employees within these positions are represented for purposes of collective bargaining by Intervenor International Union of Operating Engineers, Local 150.

laborers in performing the planting, mowing, trimming, fertilizing, seeding, sod laying, weeding, and other tasks. The working foremen direct the work at the jobsite and operate equipment such as tractors and skidsters. The mechanic performs mechanical maintenance and repairs to the Employer's equipment.

During the 2003 season, the Employer also employed a foreman by the name of Michael Daidone, the brother-in-law of the Employer's President. He has worked for the company approximately one year and earns a salary. According to the President, Daidone works alongside the plantsmen, construction laborers, and general laborers, and has no supervisory authority or authority to direct other employees' work. Daidone is apparently in training to become a working foreman but has not yet achieved this status.

Only two witnesses testified at the hearing herein: a Business Agent/Organizer of the Production Workers Union and the President of the Employer. According to the Organizer, he went to the Employer's facility in April or May 2003, and spoke with some employees as they exited the facility. On a second visit to the facility he received approximately fourteen signed authorization cards from employees and deposited the cards at his Union's office. At some later date, the Union also allegedly received approximately two authorization cards from employees by mail. According to the Organizer, he returned to the Employer's facility in early May 2003 and presented to the Employer's President a letter stating that the Union had received authorization cards from a majority of its employees, and requested that the Employer sign a letter of recognition. The Organizer further testified that he directed the President to contact the Union's Lead Organizer with her response to the letter of recognition. Thereafter, the Organizer had no further involvement with the Employer's employees. The Petitioner subpoenaed the authorization cards from the Production Workers Union for production at the first day of the hearing herein. They were not produced and the Production Worker's Organizer stated that he was unable to locate the cards. Pursuant to Regional Order, the Production Workers Union was requested to produce the cards at the hearing's resumption for an *in camera* inspection, but failed to produce them at the resumption as well.

At the hearing's resumption, the Employer submitted an undated Recognition Agreement form signed by its President. The document makes no mention of any claim of majority support on the part of the Production Workers.

The testimony of the Employer's President makes no mention of this Recognition Agreement or any letter from the Organizer asserting majority status. According to the Employer's President, on the Organizer's second visit to her facility, he told her that a majority of employees wanted to be represented by the Union, and left her a copy of a contract. The Employer's President testified that the Organizer never offered to present signed authorization cards for her or anyone else's inspection. On the first day of hearing, the Employer's President testified that prior to the visit from the Organizer, she had already spoken to an unknown number of employees about the Production Workers Union, and they indicated a desire to be represented by it. When recalled to the stand following the hearing's resumption, the President testified that on the day she was presented with a claim of majority status by the Organizer, she spoke to approximately sixteen employees who were playing soccer on the Employer's property. The details of these alleged conversations were not provided, and the President testified in

generalities only. She stated that the employees expressed an interest in being represented by the Union. The testimony does not indicate, however, whether any of the sixteen employees are members of the petitioned unit, or whether some of the employees occupied other positions. Furthermore, as mentioned above, the President did not testify about the actual content of any conversation; she only summarized the conclusion she had drawn from the conversations.

According to the Employer's President, a few weeks later she visited the office of the Production Workers Union and signed a copy of the contract the Organizer had left with her. The contract by its terms is effective from June 1, 2003 through May 31, 2006, and states that it was signed on June 1, 2003, by both the Employer and the President of the Production Workers Union. At hearing, however, the Employer's President stated that she doubted she had signed the document on June 1, 2003, since that day was a Sunday, and had no recollection of the exact date on which she had signed it. She further testified that she did not recall whether she received a copy of the contract signed by Production Worker's President at the time she signed it, or on a later date. The Production Workers presented no evidence of the date and circumstances surrounding the execution of the contract by its President.

Documents submitted by the Employer show, however, that if cards were signed prior to June 1, and if the contract was signed on June 1, both the cards and contract were executed before the Employer had any employees on its payroll. According to the Employer's President, the first payroll period during which she employed anyone in the year 2003 was the payroll period ending June 7. The Employer's payroll record for the week ending June 7 shows that employees began working for the company on Monday, June 2, 2003.

In respect to the issue of whether any of the terms of the contract have been implemented, the only evidence concerning the parties' enforcement of the contract pertains to its union security clause. No evidence exists concerning whether any other provisions of the contract have been implemented.

The Employer presented records reflecting that it began deducting dues from its employees' paychecks in early October 2003. Three documents purport to be copies of three checks issued to the Production Workers Union, each dated October 7, 2003, and each on behalf of four employees, for dues allegedly owed for the months of August, September and October 2003.⁴ The Employer also submitted documents, which purport to be payroll records showing that dues had been deducted from 22 employees' paychecks commencing with the payroll period ending October 9, 2003, and ending with the payroll period ending November 6, 2003. A third document which purports to be a copy of a check issued December 3, 2003, to the Production Workers for \$1,425.00 indicates on its face that it represents an initiation fee of \$50 and \$25 per month dues per person for 19 employees. It does not identify the employees for which this money was transmitted. These sets of documents – one showing money deducted from paychecks, and two showing money transmitted to the Production Workers Union – do not appear to correspond. The Employer's President was the only witness called by the Employer,

⁴ One of the employees on whose behalf the dues were remitted is Michael Daidone, the employee whose voting eligibility is in dispute and whose eligibility is discussed later.

and she was unable to explain these records. Nor was testimony offered to explain why dues were transmitted to the Union on behalf of four employees for a three-month period, but on behalf of other unnamed employees, for only one month.

IV. DISCUSSION

A. The Contract Bar Issue

The Production Workers Union asserts that its contract with the Employer bars the instant election petition. The burden of proving that a contract is a bar to an election rests upon the party asserting the doctrine, Roosevelt Memoria Park, 187 NLRB 517 (1970). In the case at hand the Production Workers Union has failed to meet this burden. The preponderance of record evidence fails to establish that a majority of employees within the petitioned unit executed authorization cards designating the Production Workers Union as their collective-bargaining representative, and that they did so at a time when they were employed by the Employer. The Recognition Agreement executed by the Employer does not indicate that it is based upon a showing or an assertion of majority status by the Union; nor does the contract contain any such assertion. Thus, the evidence fails to establish that the contract executed by the Employer and Production Workers Union on or about June 1, 2003 is a collective-bargaining agreement within the meaning of Section 9(a) of the Act.

To constitute a bar to an election, a contract must be based upon a Section 9(a) bargaining relationship, John Deklewa & Sons, 282 NLRB 1375 (1987). In addition, the Section 9(a) contract “must be signed by the parties prior to the filing of the petition that it would bar and it must contain substantial terms and conditions of employment sufficient to stabilize the parties’ bargaining relationship,” Seton Medical Center, 317 NLRB 87 (1995); See also Appalachian Shale Products, 121 NLRB 1160 (1958). Furthermore, there must be evidence that the employer applied the contract to the covered employees, or the union sought to have the contract administered in order for the contract to bar a petition for an election, Tri-State Transportation Co., 179 NLRB 310 (1969).

Although the contract executed by the Employer and Production Workers Union purports to apply to members of the petitioned unit, and contains substantial terms and conditions of employment sufficient to stabilize the parties’ bargaining relationship, the parties failed to present evidence that the contract was based upon a Section 9(a) relationship. There is no evidence establishing which, if any, members of the petitioned unit allegedly executed authorization cards designating the Production Workers as their collective-bargaining representative, or whether persons who signed such cards were employed by the Employer at the time they did so. The record contains only conclusionary and generalized testimony. Thus, it cannot be determined whether the Production Workers enjoyed majority status at any point in time. Neither the contract nor the Recognition Agreement contains any reference to a Section 9(a) relationship, or any other language indicating that the Production Workers Union represents a majority of employees within the petitioned unit.

The Production Workers and Employer presented oral testimony in an attempt to establish that the Union enjoys Section 9(a) status. The Organizer for the Production Workers

Union testified that he received approximately sixteen signed authorization cards from the Employer's employees, and that two more cards were received later by mail. Although the Petitioner subpoenaed authorization cards from the Union at the first day of hearing, and the Union was again requested to produce the cards when the hearing resumed, the Union has failed to produce any authorization cards. As a result, no objective evidence of majority status exists.

Instead, the Union and Employer relied upon the testimony of the Union's Organizer and the Employer's President to meet the burden of establishing a contract bar. The Organizer testified that he went to office of the Employer's President and told her that the Union represented a majority of the Employer's employees, but never offered to show her authorization cards. The Employer's President testified that the Organizer claimed to represent a majority of employees, but made no offer to have the authorization cards verified. The Employer's President asserted that in response to the Union's claim of majority support, she spoke to approximately sixteen employees who were playing soccer on company property. She testified that she asked them as a group if they were interested in being represented by the Production Workers Union, and as a group the response was affirmative.

Even assuming some individuals executed authorization cards; payroll records of the Employer indicate the individuals signed the cards before they were employed by the Employer. The record also indicates that no employees were employed on June 1, 2003, the date the parties' contract was purportedly signed. Thus, documentary evidence undermines the witnesses' conclusionary testimony and indicates that the parties do not enjoy a Section 9(a) relationship.⁵

In addition to the lack of evidence of evidence establishing 9(a) status, the evidence does not clearly establish that the parties' contract was executed before the present petition was filed. Although the contract's signature page states that it was signed on June 1, 2003, the Employer's President testified that she doubted she signed the document on that date, and could not recall the exact date on which it was signed, stating only her belief that she signed the document in the

⁵ Even if the testimony of these two individuals were credited, the evidence is insufficient to establish that the Union had received signed authorization cards from a majority of the employees that were eligible to be represented by it. At the time, the Employer employed twenty-three employees in the plantsman, construction laborer, general laborer, and the truck driver positions, and five employees in the working foreman/operator and mechanic positions. Because the contract between the Production Workers and the Employer includes working foremen and mechanics, it appears that the Union was not aware that the employees in those job positions were already represented by the Intervenor Operating Engineers. Because the record contains no evidence identifying the job classification of any employee who may have signed an authorization card, it is impossible to determine whether the sixteen cards that the Union claims to have collected were from at least twelve eligible unit members. Furthermore, it is unclear from the Employer's testimony whether all of the approximately sixteen employees to whom she spoke were also eligible members of the unit. Nor is it clear that each of the sixteen employees to whom the Employer's President spoke responded individually in favor of representation by the Production Workers.

Spring of 2003. No evidence was submitted regarding the date the contract was signed by the Production Workers' President.

Finally, the Production Workers and Employer submitted limited and inconclusive evidence concerning whether the contract has in fact been implemented. The only contract provision concerning which evidence was proffered was its union security clause. The evidence on this issue is unclear since one set of documents shows that dues were transmitted to the Union on behalf of four employees for three months, while another exhibit purports to show that dues were deducted from 22 employees' paychecks commencing in October, 2003 (if not transmitted to the Union), and another document purports to show that dues were transmitted to the Union on behalf of 19 employees for only a one month period. No evidence was presented that any of the other provisions of the contract concerning wages, hours, and terms and conditions of employment have been implemented to date.

Because the evidence fails to establish: a) that a majority of members of the petitioned unit signed authorization cards designating the Production Workers Union as their collective-bargaining agent; b) that if such cards were signed, they were executed at a time when the signatories were employed by the Employer; c) that the contract between the Employer and Production Workers Union was executed after a majority of the Employer's employees had executed authorization cards; d) that the contract was signed prior to the filing of the instant petition ; and e) that the terms and conditions of the contract were implemented prior to the filing of the present petition, it is concluded that the contract between the Production Workers Union and the Employer does not bar the instant petition.

B. The Appropriate Time to Conduct the Election

Because the evidence shows that the Employer operates a seasonal business, it is necessary to determine the appropriate time to conduct an election. The Employer recalls/rehires employees typically between March and June and lays them off in October or November depending upon the weather and workload. Payroll records from 1999 through 2003 show that the Employer on average recalls/rehires 73.5% of the employees employed the previous season. The Board has held that when an employer operates a seasonal business, an election should be held at or about the approximate seasonal peak, among the employees in the appropriate unit who are employed during the payroll period immediately preceding the date of the issuance of the notice of election by the Regional Director, See Saltwater, Inc., 324 NLRB 343 (1997); Dick Kelchner Excavating Co., 236 NLRB 1414 (1978); Kelly Brothers Nurseries, Inc., 140 NLRB 82, 86 (1962). Since the evidence indicates that the Employer's business is seasonal, an election shall be subsequently ordered at or about the approximate seasonal peak.

C. The Eligibility of Michael Daidone to Vote in the Election

The Petitioner contends that Michael Daidone should not be eligible to vote because he is the brother-in-law of the Employer's President, and was employed as a salaried laborer/foreman at the time the petition was filed. At the hearing in this matter some testimony was presented concerning Michael Daidone's employment. However, the evidence of record is insufficient from which to make reasoned findings of fact and conclusions concerning the proper inclusion or exclusion of Michael Daidone from the unit. Since Michael Daidone will likely constitute less than five percent of the number of employees eligible to vote in the unit found appropriate herein, in order to effectuate the purposes of the Act through expeditiously providing for a representation election, Michael Daidone if employed on the eligibility date and the date of the election shall be allowed to vote subject to challenge and his eligibility to vote shall be determined, if necessary, in post-election proceedings.

V. DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned, among the employees in the unit found appropriate at the time and place set forth in the notice of intent to conduct election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the issuance of the notice of intent to conduct election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strikes who have retained their status, as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Those in the unit who are in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are former unit employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

- a) Laborers District Council of Chicago and Vicinity, or
- b) Production Workers Union of Chicago and Vicinity Local 707, or
- c) **jointly**, by International Union of Operating Engineers, Local 150 and International Brotherhood of Teamsters, Local 703, or
- d) None of the above.

VI. NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices, Club Demonstration Services, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

VII. LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the undersigned within 7 days from the date of the issuance of the notice of intent to conduct election. North Macon Health Care Facility, 315 NLRB 359 (1994). The undersigned shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 200 West Adams Street, Suite 800, Chicago, Illinois, 60606-5208, on or before the date which will be set forth in the notice of intent to conduct election. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

VIII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to

the Executive Secretary, 1099-14th Street. N.W., Washington, DC 20570. This request must be received by the Board in Washington by February 17, 2004.

DATED at Chicago, Illinois, this 2nd day of February 2004.

/s/Roberto G. Chavarry
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